

1 Timothy Litzenburg (appearance *pro hac vice*)
2 Curtis G. Hoke (State Bar No. 282465)
3 **THE MILLER FIRM, LLC**
4 108 Railroad Ave.
5 Orange, VA 22960
6 Telephone: (540) 672-4224
Facsimile: (540) 672-3055
tlitzenburg@millerfirmllc.com
choke@millerfirmllc.com

7 *Attorneys for Plaintiff*
8 DEWAYNE JOHNSON

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN FRANCISCO**

11
12 DEWAYNE JOHNSON,
13 Plaintiff,
14 vs.
15 MONSANTO COMPANY,
16 Defendant.

Case No.: CGC-16-550128

**PLAINTIFF'S OPPOSITION TO
MONSANTO'S MOTION IN LIMINE
NO. 8**

Trial Judge: TBD

Trial Date: June 18, 2018

Time: 9:00 a.m.

Department: TBD

1
2 **I. INTRODUCTION**

3 Monsanto Company ("Monsanto") alleges that the letter written by Marion Copley to Jess
4 Rowland in 2013 ("Ms. Copley's letter") is inadmissible hearsay and that it would unfairly
5 prejudice Monsanto. Not so. It is likely that Monsanto will introduce deposition or live testimony
6 of Jess Rowland at trial. To rebut Mr. Rowland's credibility, Plaintiff should be allowed to
7 introduce the letter. To that end, Ms. Copley's letter would not be used to prove that Roundup
8 causes cancer, but to test the credibility of Mr. Rowland. Mr. Rowland's credibility is at issue, as
9 pointed out in Judge Vince Chhabria's order. *See* Declaration of Curtis Hoke, **Ex. A.** (Judge
10 Vince Chhabria's Order).
11

12 At trial, it is likely that Monsanto will attempt to prove with Mr. Rowland's live or
13 deposed testimony that it did not have any improper contacts with the U.S. Environmental
14 Protection Agency ("EPA"). If Monsanto introduces such evidence, then Mr. Johnson will be
15 unfairly prejudiced by the exclusion of Ms. Copley's letter because its contents goes directly to
16 Mr. Rowland's credibility and Monsanto's influence over him and other members of the EPA.
17 Monsanto's improper actions to mislead the EPA has always been one of the central claims in
18 this case. Thus, Monsanto should not be allowed to introduce Mr. Rowland's testimony via live
19 or deposed while at the same time seeking to exclude relevant credibility evidence against Mr.
20 Rowland.
21
22

23 Furthermore, Ms. Copley's letter is authenticated by circumstantial evidence and Mr.
24 Rowland's own deposition testimony. The personal nature of the letter, revealing personal and
25 workplace disputes between Ms. Copley and Mr. Rowland, along with Mr. Rowland's testimony
26

1 during deposition that he and Ms. Copley did have disputes, substantiates that the letter is what it
2 purports to be. Although, Mr. Rowland's testimony was that he never received the letter. *See*
3 Declaration of Curtis Hoke, **Ex. B.** (Rowland Deposition) at 109:11-16. The letter was addressed
4 to him, and made note of personal information, including allegations of collusion, which were
5 investigated by the Office of Inspector General. *See* Declaration of Curtis Hoke, **Ex. C.**
6 (Inspector General Letter)(May 31, 2017). Thus, the jury should decide what weight they will
7 give to the letter in determining Mr. Rowland's credibility.
8

9 This Court should resist Monsanto's attempt to suppress relevant evidence concerning
10 one of the central issues in this case: Monsanto's attempts to mislead the EPA.
11

12 **II. ARGUMENT**

13 **A. Ms. Copley's Letter Is Relevant Evidence Of Mr. Rowland's Credibility**

14 “Relevant evidence” means evidence, including evidence relevant to the credibility of a
15 witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact
16 that is of consequence to the determination of the action. *See*, Cal. Evid. Code § 210; *People v.*
17 *Pearson*, 56 Cal. 4th 393, 438 (2013); *People v. Wheeler*, 4 Cal. 4th 284, 295 (1992). No evidence
18 is admissible except relevant evidence. Cal. Evid. Code § 350 (West). A court “has no discretion
19 to admit irrelevant evidence.” *See, People v. Babbitt*, 45 Cal. 3d 660, 681 (1988), as modified on
20 denial of reh'g (Aug. 25, 1988). At trial, the "jury may consider in determining the credibility of
21 a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his
22 testimony." Cal. Evid. Code § 780. In all but a few exceptions, none which apply here, doubts
23 about the credibility of the in-court witness should be left for the jury. *People v. Hovarter*, 189
24 P.3d 300, 311 (Cal. 2008).
25
26

1 At trial, it is likely that Monsanto will seek to introduce deposition or live testimony of
2 Jess Rowland in an attempt to show that it did not mislead the EPA. In order to rebut such
3 testimony, Plaintiff intends to question Mr. Rowland's credibility by introducing the letter
4 written by Ms. Copley. Ms. Copley's letter clearly alleges that members of the EPA had
5 improper and illegal contacts with Monsanto. *See* Declaration of Curtis Hoke, **Ex. D.** (Ms.
6 Marion Copley's Letter). That Mr. Rowland knew about these contacts and did nothing. *Id.* And
7 that Mr. Rowland also had improper and illegal contacts with Monsanto. *Id.* It is true that Mr.
8 Copley's letter does imply that Monsanto's glyphosate-based products cause cancer, but Plaintiff
9 would not seek to use the letter to prove as much, it would be used to test the credibility of Mr.
10 Rowland.
11
12

13 In fact, Mr. Rowland's credibility has already come into question. In Judge Vince
14 Chhabria's order, the judge references the "somewhat evasive" nature of Mr. Rowland's answers
15 during deposition. *See* Declaration of Curtis Hoke, **Ex. A.** (Judge Vince Chhabria's Order).
16

17 During Mr. Rowland's deposition, Mr. Rowland was asked if he received Ms. Copley's
18 letter. *See* Declaration of Curtis Hoke, **Ex. B.** (Rowland Deposition) at 109:11-16. Mr. Rowland
19 stated that he had not. *Id.* However, the letter was addressed to him and referenced personal
20 issues that only Ms. Copley and Mr. Rowland would have known about. Thus, there is a question
21 as to the truth of Mr. Rowland's statements at deposition and potential statements at trial.
22

23 As such, the jury should decide if Mr. Rowland received the letter and use it to weigh
24 against his credibility.

25 Furthermore, to allow Monsanto to exclude such relevant evidence of Mr. Rowland's
26 credibility would unduly prejudice Mr. Johnson. If the Court grants Monsanto's motion, it would
27

1 effectively prevent Mr. Johnson from presenting to the jury evidence questioning the credibility
2 of the witness.

3 Excluding such relevant and probative evidence from the jury is not permitted. *People v.*
4 *Gonzalez*, 135 P.3d 649, 654 (Cal. 2006). Therefore, the Court should deny Monsanto's Motion
5 *in limine* No. 8.
6

7 **B.) Ms. Copley's Letter Is Authenticated By Circumstantial Evidence and Mr.**
8 **Rowland's Deposition Testimony**

9 Authentication can be established by any one of a variety of means. *Interinsurance Exch.*
10 *v. Velji*, 118 Cal. Rptr. 596 (Cal. App. 2d Dist. 1975). There is no strict requirement as to how a
11 party authenticates a writing. *Ramos v. Westlake Services LLC*, 195 Cal. Rptr. 3d 34, 41 (Cal.
12 App. 1st Dist. 2015). The proponent need only introduce, (a) "evidence sufficient to sustain a
13 finding that it is the writing that the proponent of the evidence claims it is or (b) the
14 establishment of such facts by any other means provided by law." Cal. Evid. Code § 1400.
15 Evidence showing that a document is what it claims it is may be established by circumstantial
16 evidence. *People v. Valdez*, 135 Cal. Rptr. 3d 628, 635 (Cal. App. 4th Dist. 2011). Likewise, the
17 authenticity of a document "may be established by the contents of the writing." *Daniel v.*
18 *Wayans*, 213 Cal. Rptr. 3d 865, 887 (Cal. App. 2d Dist. 2017). And "testimony of a subscribing
19 witness is not required to authenticate a writing." Cal. Evid. Code Ann. § 1411; *Stevens v. Irwin*,
20 12 Cal. 306, 306 (1859)("A subscribing witness to a written instrument, if within the jurisdiction
21 of the Court, must be produced, or some sufficient reason given for his absence.")
22
23
24
25
26
27

1 If there are conflicting inferences that can be drawn regarding authenticity, those go "to
2 the document's weight as evidence, not its admissibility." *Daniel v. Wayans*, 213 Cal. Rptr. 3d
3 865, 888 (Cal. App. 2d Dist. 2017).

4 Ms. Copley's letter authenticates itself. The contents of Ms. Copley's letter is personal in
5 nature. Only Ms. Copley or someone else that worked with Mr. Rowland would know that Mr.
6 Rowland has a degree from Nebraska in 1971 and that she and he argued many times on the
7 Cancer Assessment Review Committee (CARC). Mr. Rowland's own testimony affirms the
8 contents of the letter and the personal information contained. Mr. Rowland testified that he and
9 Ms. Copley had issues. *See* Declaration of Curtis Hoke, **Ex. B.** (Rowland Deposition) at 116:8-
10 14. His testimony affirms the personal issues raised in the letter and authenticates its contents.
11

12 Likewise, Ms. Copley's collusion allegation in the letter against Mr. Rowland
13 authenticates the letter. Ms. Copley's letter states that Mr. Rowland "intimidated staff on CARC
14 and changed HIARC and HASPOC final reports to favor industry." *See* Declaration of Curtis
15 Hoke, **Ex. D.** (Ms. Marion Copley's Letter). While Mr. Rowland did not admit to colluding with
16 Monsanto at his deposition. Mr. Rowland did tell a Monsanto employee that "if I can kill this I
17 should get a medal" speaking in reference to the glyphosate report on the carcinogenicity of
18 glyphosate. *See* Declaration of Curtis Hoke, **Ex. E.** (Email Chain). In fact, the Inspector General
19 investigated Mr. Rowland for collusion between himself and Monsanto for, in part, leaking an
20 incomplete assessment of glyphosate. *See* Declaration of Curtis Hoke, **Ex. F.** (News clipping).
21 Within days of the leak, Mr. Rowland was placed on administrative leave.
22

23 Furthermore, Ms. Copley's letter was written years before the Inspector General's
24 investigation or public allegations of collusion. *See* Declaration of Curtis Hoke, **Ex. D.** (Ms.
25

1 Marion Copley's Letter). High profile news articles and public interest did not begin to take
2 interest in Glyphosate-based products until after IARC's pronouncement in 2015. Only Ms.
3 Copley would have been privy to Mr. Rowland's collusion with Monsanto in 2013.

4 The personal information, detailed facts, time written, and substantiated allegations
5 against Mr. Rowland authenticates Ms. Copley's letter as a document that only Ms. Copley could
6 have drafted.

7
8 **C.) Ms. Copley's Letter Is Relevant To Mr. Rowland's Credibility And It Is Not**
9 **Unduly Prejudicial To Monsanto**

10 "In general, evidence is substantially more prejudicial than probative if it poses an
11 intolerable risk to the fairness of the proceedings or the reliability of the outcome." *Hernandez v.*
12 *County of Los Angeles*, 173 Cal. Rptr. 3d 226, 237 (Cal. App. 2d Dist. 2014)(*emphasis added*).

13 Here, it seems that Monsanto has confused what is prejudicial evidence to its defense
14 with the meaning of unduly prejudicial evidence. However, damaging evidence is not
15 synonymous with unduly prejudicial evidence. Monsanto should not be allowed to escape the
16 former.

17 Evidence used to rebut Monsanto's assertions that it did not have improper contacts with
18 the EPA is relevant and it is indeed a central issue in this case. Indeed this evidence will be
19 prejudicial to Monsanto, but it is not an intolerable risk to the fairness of the trial.

20
21
22 **IV. CONCLUSION**

23 For the above stated reasons, Plaintiff respectfully requests that this honorable Court
24 DENY Monsanto's Motion *in limine* No. 8.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respectfully submitted,

THE MILLER FIRM, LLC

DATED: June 7, 2018

By: /s/ Timothy Litzenburg
Timothy Litzenburg (appearance *pro hac vice*)
Curtis G. Hoke (SBN 282465)
THE MILLER FIRM, LLC
108 Railroad Ave.
Orange, VA 22960
(540) 672-4224 phone
(540) 672-3055 fax
tlitzenburg@millerfirmllc.com
choke@millerfirmllc.com

Attorneys for Plaintiff,
DEWAYNE JOHNSON